U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: WAC 02 266 52209 Office: CALIFORNIA SERVICE CENTER Date: AUG 23 2004

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The Director, California Service Center, denied the immigrant visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a home health care provider. It seeks to employ the beneficiary permanently in the United States as a registered nurse-charge nurse. As required by statute, a Form ETA 750 Application for Alien Employment Certification accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a statement.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The regulation at 8 C.F.R. § 204.5(d) additionally provides, in pertinent part, that:

> The priority date of any petition filed for classification under Section 203(b) of the Act which is accompanied by an application for Schedule A designation or with evidence that the alien's occupation is a shortage occupation with the Department of Labor's Labor Market Information shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [CIS].

Eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the date the petition was submitted. Here, the petition was submitted on August 26, 2002. The proffered wage as stated on the Form ETA 750 is $20 per hour, which equals $41,600 per year.

The petition states that the petitioner employs 1,350 workers. With the petition counsel submitted a letter, dated August 20, 2002, from the petitioner's financial controller. In that letter, the financial controller states that the petitioner employs more than 1,350 workers and is able to pay the proffered wage.

The California Service Center, on October 22, 2002, requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested either the petitioner's annual report, federal tax return, or audited financial statements for 2001. In that request for evidence, the Service Center acknowledged the statement of the petitioner's financial officer that the petitioner employs more than 100 workers and has the ability to pay the proffered wage. The Service Center did not explicitly state any reason for disregarding that statement and requesting additional evidence of the petitioner's ability to pay the proffered wage.

In response, counsel submitted a copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner had gross receipts of over $22 million during that year. The petitioner declared a loss of $1,438,868 as its taxable income before net operating loss deduction and special deductions during that year and ended the year with current liabilities in excess of its current assets.

Counsel also provided a copy of the 2001 Form 990, Return of Organization Exempt from Income Tax of Helping Hands Sanctuary of Idaho, a non-profit organization with which the petitioner has contractual ties. Counsel did not make explicit the proposition he intended to support by providing that return.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on January 8, 2003, denied the petition.

On appeal, counsel states, but provides no evidence to support, that the petitioner's losses have been occasioned by its inability to hire foreign nurses. Counsel further states, but provides no evidence to support, that the petitioner's gross receipts during its fiscal year 2002 exceeded 60 million, and that the petitioner has the ability to pay the proffered wage.

The burden of demonstrating the ability to pay the proffered wage is not lifted from the petitioner by unsupported allegations. Further, a petitioner may not generally rely on its gross receipts as an index of its ability to pay the proffered wage. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses or otherwise increased its net income, the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's net income.

As was noted above, 8 C.F.R. § 204.5(g)(2) allows organizations which employ at least 100 workers to submit a statement from a financial officer stating that the U.S. employer is able to pay the proffered wage. This provision was adopted in the final regulation in response to public comment favoring a less cumbersome way to allow large, established employers to utilize a more simplified route through adjudication. *See* Employment-Based Immigrants, 56 Fed. Reg. 60897, 60898 (Nov. 29, 1991). Although the director retains the discretion to reject the assurances of a financial officer in some cases, this alternative recognizes that large employers may have large net tax losses but remain fiscally sound and retain the ability to pay the proffered wage.

Such a statement was submitted in this case. The Service Center disregarded it, but declined to give any reason. Absent any reason, disregarding the statement is an abuse of discretion. The statement is an original letter, with an original signature, that named the beneficiary personally. Thus, it bears more credibility that a photocopied generic letter that references a single unnamed beneficiary.

This office notes that the petitioner and counsel have alleged that the petitioner employs more than 100 workers. Nothing in 8 C.F.R. § 204.5(g)(2) states or implies that, absent evidence, the director must accept that statement as proven. The director is, generally, entitled to insist that the petitioner demonstrate that it employs 100 or more workers.

According to its tax returns, however, the petitioner has a payroll of more than $13 million annually. That amount is not merely consistent with employing 100 or more workers, but clear and convincing evidence of it. Given the nature of the petitioner's business, that it pays its employees an average of more than $100,000 annually is manifestly unlikely.

In this case, although the petitioner's federal tax return showed a net loss for 2001, the balance of the evidence indicates that the petitioner has been in business for ten years, grossed over 22 million in 2001, paid over 13 million dollars in salaries and wages, operates multiple medical facilities, and is producing increasing revenues. Here, the totality of the circumstances reflecting the magnitude of the petitioner's operations in conjunction with the favorable regulatory language relating to large employers at 8 C.F.R. § 204.5(g)(2), weighs in the petitioner's favor.

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Based on the evidence in the record, the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely on the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.